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No. 04-757

IN THE

Supreme Court of the United States

JEB BUSH,
GOVERNOR OF THE STATE OF FLORIDA,
Petitioner,

v.

MICHAEL SCHIAVO,
GUARDIAN: THERESA SCHIAVO
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Florida

AMICUS BRIEF OF TERRI SCHIAVO'S PARENTS MARY AND ROBERT SCHINDLER IN SUPPORT OF THE PETITIONER

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IDENTITY AND INTEREST OF AMICI[1]

Amici Mary and Robert Schindler are the parents of Terri Schiavo. Their interest in this case is in: saving Terri's life and providing her with therapy and rehabilitation;[2] protecting her from a guardian -- her estranged husband, Michael -- who has flagrant conflicts of interest and who seeks Terri's death; obtaining for Terri a guardian who will zealously seek her welfare; and, defending the statute and executive order at issue here which were all that stood[3] between Terri and an excruciating death by starvation and dehydration.[4]

The Schindler's sought unsuccessfully to intervene in the present case. Lacking party status, the Schindlers submit this brief, with the consent of the parties, as amici curiae.

SUMMARY OF ARGUMENT

This is not a "right to die" case. Rather, this case is about efforts to protect a vulnerable, disabled young woman from harm at the hands of those with manifest conflicts of interest. Amici offer three points.

First, because this case arrives on appeal from the grant of

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[1]No person or entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

[2]As noted below, *infra* § I, in the posture of this case the Court must take as true the proposition (which amici firmly believe is accurate) that Terri is *not* in a persistent vegetative state, that she can communicate, and that she *would* benefit from therapy. *See also infra* note 7.

[3]The circuit court recently entered a stay which protects Terri during the pendency of an appeal in the underlying guardianship proceedings. *See* Order, *In re Schiavo*, No. 90-2908-GD-003 (Pinellas County Cir. Ct. Oct. 28, 2004).

[4]*See Brophy v. New England Sinai Hosp.*, 398 Mass. 417, 444 n.2, 497 N.E.2d 626, 641 n.2 (1986) (Nolan, J., dissenting) (detailed description of death by dehydration and starvation).

summary judgment, this Court must indulge all factual inferences in favor of the petitioner. Thus, this Court must assume that Terri Schiavo is *not* in a "persistent vegatative state," that she is aware and able to communicate, and that she could benefit from rehabilitation therapy. Further, this Court must assume that Terri does *not* wish to die from starvation and dehydration, and that respondent, her estranged husband and legal guardian, wants Terri to die for his own selfish reasons (to inherit her estate and to marry his live-in fiancée).

Second, the legal rationale the Supreme Court of Florida gave for its ruling is so dramatically out of step with its previous statements of the Florida doctrines of separation of powers and unlawful delegations that the ruling below can only be understood as having minted a *new rule* applicable only in the context of treatment decisions for incompetent persons. That new rule is that, unlike in any other context, once the state courts have ruled on a *treatment decision for an incompetent person,* the independent police powers of the executive and legislative branches are wholly extinguished. That new rule, as the petitioner has demonstrated, is unconstitutional, *as applied*, as a matter of federal due process and equal protection.

Third, the strikingly anomalous nature of the state supreme court's ruling, combined with that court's complete failure to explain why it rejected petitioner's assertion of federal rights, warrant a remand for clarification. *See Bush v. Palm Beach County Canvassing Board,* 531 U.S. 70, 78 (2000) (per curiam). A remand would allow the court below to clarify whether in fact the court's new rule is limited to the context of treatment decisions for incompetent persons, and why the court did not believe it needed to address petitioner's assertion of federal rights. Such a clarification, in turn, would greatly assist this Court in delimiting the precise federal question presented.

ARGUMENT

The Supreme Court of Florida has rendered an astonishing and unprecedented ruling. That court held that once any court, in litigation between private parties, has issued a decree regarding the care and treatment of an incompetent person, neither the legislative nor the executive branch can take independent steps on behalf of the incompetent person's welfare.

As petitioner Governor Jeb Bush has demonstrated, the state supreme court's construction of the Florida Constitution to produce such a ruling renders that *state* constitution, *as applied,* unconstitutional under the *federal* constitution, both as a matter of due process (denying Terri Schiavo a fair and accurate determination of her wishes, and denying the state, acting as her proxy, the opportunity to litigate issues material to Terri's rights) and equal protection (applying this restrictive rule only in the context of incompetent persons).

Terri's parents Mary and Robert Schindler, as amici, wish to highlight several points in support of the petition.

I. THIS COURT MUST VIEW THE FACTS IN THE LIGHT MOST FAVORABLE TO THE PETITIONER.

It is black-letter law that, on appeal from a grant of summary judgment, the reviewing court must assess the facts in the light most favorable to the party resisting summary judgment. *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985); *Villazon v. Prudential Health Care Plan*, 843 So. 2d 842, 853 (Fla. 2003); *cf. Brosseau v. Haugen*, 73 U.S.L.W. 3350, 3350 n.2 (U.S. Dec. 13, 2004) (same standard under federal rules). In the present case, that means this Court must assume the following:

- Terri Schiavo is *not* in a "persistent vegetative state;"[5]

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[5]*See* Fla. Stat. § 765.101(12) ("persistent vegetative state" defined to (continued...)

- Terri's condition is neither terminal[6] nor untreatable; rather, she could benefit from therapy and regain some or all of the functions she has lost;
- Terri is aware of her surroundings and is able to communicate;[7] with therapy, Terri might regain some or all of her speech skills;
- Terri *did not and does not want to die*, especially by starvation and dehydration;[8]
- Michael Schiavo, Terri's legal husband and guardian and the respondent here, is living with another woman who has borne him two children; he wants Terri to die so he can marry this other woman without divorcing Terri;
- Michael Schiavo refuses to divorce Terri because to do so would cut off his inheritance of what remains of her assets;
- Michael does *not* have Terri's best interests at heart; in fact, he may be responsible for having caused her condition (by battering her) and may have repeatedly physically abused Terri when she was still competent.[9]

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[5](...continued)
require "unconsciousness," total absence of voluntary action and cognition, and inability to "communicate or interact purposefully"). Terri plainly does not satisfy this definition. *See infra* note 7.

[6]Terri turned 41 on December 3, 2004.

[7]*See* www.terrisfight.org (linking to videos of Terri).

[8]Respondent himself conceded in the state supreme court that, under his legal theory, determining Terri's "intent" is "not material," and that even if a "hundred juries" found against respondent on the issue of Terri's intent, the challenged law would still supposedly be unconstitutional under the Florida constitution. Answer Brief at 9, *Bush v. Schiavo* (Fla. July 23, 2004).

[9]*See* www.terrisfight.org/images/bonescan.jpg (bone scan report finding evidence of "history of trauma").

Respondent certainly has the right to contest the facts. In the present posture of the case, however, these factual suppositions must be taken as true.

II. THE FLORIDA SUPREME COURT'S APPLICATION OF THE STATE CONSTITUTION IS ANOMALOUS IN THE EXTREME.

A state constitutional provision need not be applied in a bizarre manner in order to be violative of the federal constitution. It is helpful to note, however, the gravely anomalous nature of the state supreme court's ruling here. That anomaly underscores the fact that the state supreme court in effect issued a unique, aberrant rule only to govern treatment decisions for incompetent persons.

A. Separation of Powers

The state supreme court purported to invalidate the challenged statute as a violation of the state constitutional guarantee of separation of powers. As applied in this case to shut off federal rights, this state doctrine is unconstitutional.

It is black-letter law, and simple common sense, that the state sovereign is not bound by litigation between private parties. Rather, the sovereign retains its independent authority.

For example, competing property claimants may litigate and resolve title to a tract of realty. The state may subsequently condemn the very same property under its eminent domain authority. *See* Fla. Stat. § 73.021.

Or, a divorcing couple may litigate the issue of custody over a child. After the court awards custody to one of the parents, the state may nonetheless take protective custody of that child upon sufficient suspicion of child abuse. *See* Fla. Stat. § 39.401.

In neither case would a claim that state intervention violates the "separation of powers" survive the straight-face test. That a

court has spoken in a given situation does *not* preclude third parties in general, and the state in particular, from asserting an interest in the subject of the litigation.

Indeed, even when the legislature has authorized the executive branch directly to intervene to nullify the effect of a judgment, as with the pardon or commutation of the sentence of a convicted offender, Fla. Stat. § 940.01, no one could reasonably contend that the separation of powers is offended.

Yet the Florida Supreme Court, without purporting to distinguish such situations, declared that in regard to *treatment decisions for incompetent persons*, once a state court has spoken, no branch but the judiciary can intervene. Thus, in Florida, incompetent persons facing death by starvation have less legal protection than convicted felons (who may be pardoned despite a court-imposed judgment of guilt and sentence), abused children (who may be taken into protective custody despite a court having awarded the children to the alleged abuser), and even inanimate real property (which may be taken, with just compensation, from the adjudicated owner).

In short, the lower court's ruling is inexplicable as a matter of "separation of powers," and must instead be read as creating a special rule applicable only in cases involving the treatment of incompetent persons.

B. Unlawful Delegation

The state supreme court also purported to invalidate the challenged statute as an improper delegation of legislative authority to the executive. Again, however, this ruling is so much at odds with other applications of the nondelegation principle as to render the court's decision a special rule only for the situation of state intervention to protect incompetent persons. *As applied* in this matter to shut off federal rights, the state constitutional nondelegation doctrine is unconstitutional as a

matter of federal law.

Under the doctrine of nondelegation of legislative power under the Florida Constitution, the legislature must make the "fundamental and primary policy decisions" and then provide at least "some minimal standards and guidelines" for administration of the statute. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978).

Here, the legislature made the "fundamental and primary policy decision" that, in circumstances like Terri's, there is sufficient reason to question the ongoing denial of food and fluids and to authorize life-saving intervention by the Governor.

"In implementing this policy decision," the legislature may transfer "[s]ubordinate functions" to an executive agent or body "with the expertise and flexibility needed to deal with complex and fluid conditions." *Microtel, Inc. v. Florida Public Serv. Comm'n*, 464 So. 2d 1189, 1191 (Fla. 1985). "Otherwise, the legislature would be forced to remain in perpetual session and devote a large part of its time to regulation." *Id.* Thus, the legislature

> may enact a law complete in itself, designed to accomplish a general purpose, and may expressly authorize designated officials within valid limitations to provide rules for the complete operation and enforcement of the law within its expressed general purpose.
>
> . . .
>
> This principle of law is peculiarly applicable to regulations under the police power, since the complex and ever-changing conditions that attend and affect such matters make it impracticable for the Legislature to prescribe all necessary rules and regulations.

State Dep't of Citrus v. Griffin, 239 So. 2d 577, 580-81 (Fla.

1970) (internal quotation marks and citation omitted).

Here, the state legislature narrowly delimited the circumstances in which the Governor could intervene and then entrusted to him the "operation and enforcement of the law." The state constitution normally requires no more. As the state supreme court has elsewhere observed,

> The Legislature itself is hardly suited to anticipate the endless variety of situations that may occur or to rigidly prescribe the conditions or solutions to the often fact-specific situations that arise.

Avatar Development Corp. v. State, 723 So. 2d 199, 204 (Fla. 1998).

The state supreme court has repeatedly upheld legislative authorizations of executive branch actions far more open-ended than what the law invalidated here contemplates. *E.g.*, *Avatar*, 723 So. 2d at 204 (no improper delegation where Department of Environmental Protection was authorized "to flesh out the Legislature's stated intent" by "creating rules, regulations and permit conditions necessary to effectuate the Legislature's overall policy"); *Microtel*, 464 So. 2d at 1191 (no improper delegation where commission was authorized to make certification decision "guided by the discretionary proviso that certification be in the public interest," illuminated by the "clear legislative intent to foster competition"); *State Dept. of Citrus*, 239 So. 2d at 578-79, 582 (no improper delegation where commission was authorized to promulgate marketing orders, suspend those orders if the Commission "determines that the order does not tend to effectuate the declared purpose of the Act," establish plans and programs for "advertising, merchandising and sales promotion to create new or larger domestic or foreign markets for oranges" (quoting statute), and set assessment rate, subject to a statutory ceiling); *State v. Cain*,

381 So. 2d 1361, 1362 (Fla. 1980) (no improper delegation where legislature authorized state attorney, "when in his judgment and discretion the public interest requires" (quoting statute), to prosecute, as adults, juveniles who are age sixteen or older, and noting that even "absolute" charging discretion of prosecutor is not an invalid delegation of authority).

The statute at issue here authorizes the Governor to act in certain delineated circumstances, leaving to the Governor the discretion to weigh the factors bearing upon the competing courses of action. In any other context, this would not violate the Florida Constitution. Plainly, the legislature cannot sit as an ongoing therapeutic management board or as investigator for individual wards whose guardians develop flagrant conflicts of interest. Hence, it is perfectly sensible for the legislature to authorize the Governor to handle the actual application of the stay power the legislature created.

By dramatically departing from its prior practice, the state supreme court minted a new rule governing only cases involving the treatment of incompetent persons. This new, special rule shuts off, by its unique and exaggerated demands of rigid, nondiscretionary delegation, the petitioner's assertion of federal rights in this case.

III. IN THE ALTERNATIVE, THIS COURT SHOULD REMAND SO THAT THE FLORIDA SUPREME COURT CAN CLARIFY THE BASIS FOR ITS REJECTION OF PETITIONERS' FEDERAL CLAIMS.

The state supreme court decision at issue here, as noted in the preceding section, appears to be a *sui generis* application of state constitutional rules which would normally be satisfied in this case, but which have been given a uniquely, indeed aberrantly, super-strict interpretation in the context of state efforts to protect

vulnerable, disabled persons. Moreover, the court below failed to offer any explanation either for its departure from previous state decisions or its refusal even to address petitioner's federal claims.

In such circumstances, it may be advisable to remand the case with directions that the state supreme court clarify the following matters:

1. What is the scope of the state supreme court's ruling as to separation of powers and nondelegation? I.e., is this decision confined to the context of treatment decisions for incompetent persons, or is the court's ruling also applicable across the board as the new rule for state intervention regarding child custody and abuse, government condemnation of private property, gubernatorial pardons of convicted offenders, etc.?
2. On what basis did the state supreme court reject petitioner's assertion of federal constitutional rights?

Answering these questions would aid this Court in delimiting the precise federal questions presented in a way that would greatly facilitate review.

This Court took similar action in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000) (per curiam). There, as here, the "considerable uncertainty as to the precise grounds for the decision" provided "sufficient reason" for a remand. *Id.* at 78 (internal quotation marks and citation omitted). Hence, this Court should consider a remand for clarification prior to accepting this case. *See also Employment Division v. Smith*, 485 U.S. 660 (1988) (remanding for clarification).

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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